Supreme Court, U.S.
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(1)

CASE NO. 03 224

THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 2002

LAWRENCE MOORE,

Petitioner,

v.

LOCAL UNION NO. 58, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; LOCAL 58 ANNUITY FUND; LOCAL 58 PENSION TRUST; LOCAL 58 HEALTH WELFARE TRUST; LOCAL 58 TRAINING TRUST; LABOR-MANAGEMENT CO-OP FUND; LOCAL 58 SUB PAY FUND; LOCAL 58 VACATION PAY FUND; JEFF RADJEWSKI; ELECTRICAL WORKERS JOINT BOARD OF TRUSTEES; THOMAS MITTELBRUN; NATIONAL ELECTRICAL BENEFIT FUND; and NATIONAL ELECTRICAL ANNUITY FUND,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTION PRESENTED FOR REVIEW

1. May a biased, partial and overweening "judge" solicit, and inflate an already-inflated, three-months-late motion for attorneys fees by misrepresenting a bargaining unit employee - represented by a Union certified as his "exclusive representative" under Federal Law - is a "member" of a Union he sued (for wrongfully taking both "union dues" and its special purpose funds' "required contributions" from his wages) and had "voluntarily" participated in that Union's "Voluntary Employee Beneficiary Funds" - which must be approved by the Internal Revenue Service to exist before receiving such tax-deferred wages - by *striking* his "Response" to freely distort the purpose and intent of E.R.I.S.A. § 502(g)(1); and should denial of his *petition for writ of certiorari* in the case-in-chief be reconsidered in light of that judge's now-assertion, in the Order awarding fees, that the case had been dismissed on the specious ground, "Plaintiff simply used this Court as a forum to air his political position"?

LIST OF ALL PARTIES

Petitioner/Appellant/Plaintiff Lawrence Moore, and Respondents/Appellees/Defendants: Local Union 58, International Brotherhood of Electrical Workers; Local 58 Vacation Pay Fund; Local 58 Health Welfare Trust; Local 58 Sub Pay Fund; Local 58 Annuity Fund; Local 58 Pension Trust; Local 58 Health Welfare Trust; Local 58 Training Trust; Labor-Management Coop Fund; Jeff Radjewski; National Electrical Benefit Fund; National Electrical Annuity Fund; Thomas Mittelbrun; and Electrical Workers Joint Board of Trustees.

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No district or circuit court opinions were published in U.S.D. C. No. 01-72222, or Appeal Nos. 02-1503 and 02-2073, but they are reproduced verbatim, *without typos*, in the Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

Jurisdiction over the case was proper in district court under 28 U.S.C. §§ 1331, 1337, 1343, and 42 U.S.C. § 1483, and this case arose under the Constitution's First and Fifth Amendments, Labor Management Relations Act ("L.M.R.A.") §§ 158(a)(3) (29 U.S.C. § 158), 301 and 302 (29 U.S.C. §§ 185, 186) after the Union, certified by Federal Law as "exclusive representative" for a "bargaining unit" including union nonmembers, and Funds took non-member Plaintiff's property (monies he had earned as wages under a collective bargaining agreement). The circuit court's jurisdiction to review orders of the district court was proper under 28 U.S.C. § 1291. This Court has jurisdiction to hear the matter under 29 U.S.C. § 1254(1), and Supreme Court Rule 10.

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STATEMENT OF THE CASE

A complaint was filed June 13, 2001, and the First Amended Complaint was filed, and served on all Defendants on October 9, 2001. The first cause of action for violating the First and Fifth Amendments by "taking" money from a "non-member" Plaintiff's paychecks for Local Union No. 58 ("Union") dues and its special purpose funds ("Funds") "required-contributions" and refusing to return it or give him an option of paying "agency fees" to Union, was against all the defendants, as were the second, third and fifth causes of action, respectively, for fraud and deceit, breach of contract, and intentional infliction of emotional distress.[1]

A fourth cause of action was against Union and Radjewski for breaching L.M.R.A. duties to represent him fairly ("DFR").

A prayer for declaratory relief asked: for refund of "takings" and affirmation such "takings" are illegal; to stop those "takings" and abuse of dues deduction authorizations on forms nonmembers must sign to get jobs in collective bargaining agreement ("CBA") created hiring halls; for an order that the CBA parties (union and contractor) must appoint a neutral third-party to administer that hiring hall and the CBA job referral procedure; and for an order declaring the fourth cause of action ("DFR") may be presented to the jury instead as an L.M.R.A. "breach of contract" claim.

A prayer for injunctive relief also asked to enjoin Union and its Funds: from continuing any conduct declared illegal; from all takings of non-members' wages including dues until it establishes "agency fees" procedures; and to require the Union and its Funds to notify non-members of a right "to be reimbursed for the years of ill-gotten 'takings.'" Plaintiff also prayed for special damages, punitive damages and such further relief deemed just and proper.

Union and Radjewski filed their Answer on October 29, 2001, and Plaintiff served interrogatories and requests for production of documents on them on December 3, 2001.

Funds Defendants, including their "administrator" Mittelbrun,

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[1] Plaintiff also alleged that "takings" included kickbacks to contractors (in amounts equal to Funds' takings) from overtime pay for deducting those "takings" from non-members wages for Union Defendants. Exact amounts taken are still unknown because that Union will not let a non-member see the CBA, and the courts would not allow any "discovery."

filed and served a "Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative, Summary Judgment" October 29, 2001 supported by Mittelbrun's Affidavit and exhibits. Plaintiff responded November 26, 2001, and included his Affidavit and exhibits, and his separate F.R.Civ. P. 56(f) Affidavit. Union Funds' December 4, 2001 Reply was supported only by another self-serving Affidavit by Mittelbrun.

Union and Radjewski then filed a "Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative Summary Judgment as to Counts I-V of Plaintiff's Complaint" November 19, 2001, supported by Radjewski's "declaration." The Plaintiff's December 14, 2001 Response included another F.R.Civ.P. 56(f) Affidavit showing outstanding discovery requests, and Union Defendants filed a **late**, unsupported Reply.

Union Defendants discovery responses **were also late**, they moved for a "protective order" against all discovery (despite filing their Answer, and their Motion for Summary Judgment).

The court held a telephone status conference, filed a January 7, 2002 Order permitting Union to avoid all discovery and Funds then wrote that biased, partial judge for dismissal "to expedite...a decision, that might help to minimize the continuing costs to defendants ...." Please see the Appendix "Apx" at 16-22.

A March 18 Order granted dismissal, and summary judgment (Apx 23-37) *via* a "Background" and "Analysis" misrepresenting: Plaintiff's "position is directly contrary to the purpose of [LMRA § 158(a)(3)] as explained by the *Beck* Court" (Apx 34); Constitutional claims "are factually and legally without merit" (Apx 35); and Union Defendants are "private parties" (34-36), to conclude, "the limitation that [LMRA] § [15]8(a)(3) places on the use of nonmember dues is simply not implicated here" (Apx 31-33).[2]

The court's attacks were for "insist[ing] ... Local 58 had 'no

[2] That Order is reproduced **without typos**, all the Plaintiff's affidavits showed Defendants' "political" and "organizing" (like *Beck*) spendings, and that Order also lied that: he tried to "avoid the negotiated overtime arrangements"; his claim "dues" were used for "political or other non-core activities" is "unsubstantiated"; Funds' "takings" from wages are employers' "contributions"; and "union dues" claims are unsustainable. Bias also taints later "striking" of his "**late**" attorneys' fees opposition.

right' to deduct dues from his wages or other nonmembers of the Local 58" (sic) (Apx 34), and his suing "out of retaliation" (36).

That lower court also argued allegations in his First Amended Complaint, "that an unknown amount of benefits were taken from him [are] directly contrary to the explanation that Radjewski gave to him," and that his 1998 "benefits would have been sent to [a] home fund if he had timely submitted the reciprocity form."[3]

Plaintiff moved to vacate the Judgment (providing an affidavit and evidence of National Electrical Benefit Fund's multi-millions in political-spendings), but it was summarily rejected.

On appeal Judgment was affirmed in a *Not Recommended For Full-Text Publication* Order filed September 13, 2002 (mis-stating the case was also filed "pursuant to" ERISA), summed up claims, and rejected judicial bias and partiality arguments to conclude,

> "Moore's complaint lacked merit. Moore's first claim, in which he asserts that the defendants violated his constitutional rights, is not actionable. Generally, 'the conduct of private parties lies beyond the Constitution's scope ....'"

Apx 57.

That court admitted Plaintiff is "not a member of Local 58," but misrepresented: the *public* hiring hall administering the CBA-created job Referral Procedure was **"Local 58's hiring hall"**; that his "main complaint is that Local 58 supposedly tricked him into signing the dues deduction authorization"; that his other "primary allegations" are the Union denied him "a voice as a non-member" (lumping in the *true primary allegation* that the CBA didn't allow any "takings" from non-members), and dues are used for political contributions (ignoring "organizing" and other "allegations"); that the "fourth" DFR claim preempted all "state law claims"; and that all of Plaintiff's claims were "time-barred." (Apx 56-58).

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[3] In 1998 General Motors locked everyone out prior to a strike and the Plaintiff was offered an alternate job by his employer, but Radjewski would only allow contractors to transfer Union's "members," promising "non-members" preference in re-hiring after that lock-out, but reneged, forcing Plaintiff to leave before he completed a "reciprocity" form.

Funds' April 1, 2002 attorneys' fees motion in district court was devoid of "formal" or "substantive" merit and didn't deserve a response, but **the court** *sua sponte* wrote Funds' counsel advice on amending the motion on July 8, 2002, also "**request[ing] that Defendants Funds and Mittelbrun supplement their Motion with the necessary information**" (Apx 39). A "First Supplement to Brief In Support of Defendants Funds and Mittelbrun's Motion For Attorneys Fees And Costs" and affidavit of Patricia Fabrizio **were filed three and one-half months after Funds Defendants' original late-served motion was filed**. Plaintiff timely filed both a Response and Affidavit that did not prejudice a Funds Reply.

But district court struck Plaintiff's Response, and Affidavit as "deemed not a part of the record of this case" on August 6, 2002 (Apx 40), and filed the "Order Granting In Part Defendants Funds' and Mittelbrun's Motion For Attorneys' Fees And Costs" (Apx 41). The Order misrepresented that Plaintiff "failed to file a timely response," and stated,

> "For the reasons below the Court will GRANT an award of attorneys fees to Defendants Funds and MITTELBRUN without regard to Plaintiff's ability to pay...."

Apx 41. Its "Background" misrepresented all of the Funds could seek fees pursuant to Employee Retirement Income Security Act ("ERISA") § 502(g)(1) (29 USC § 1132(g)(1)) (Apx 42).

That court's "Analysis, ***Bad faith***" begged a question whether Plaintiff's claims were "based in law" and projected its "personal political agenda," and "belief" onto him, citing "per Defendants," made *ad hominem* attacks on him, citing its own *Westlaw* search, to conclude he had brought "a frivolous claim" and was "culpable where lawsuit filed despite strong adverse precedent" (Apx 44).

Its "***Ability to Pay*** section misrepresented and maliciously applied other courts' opinions to beg questions that "plaintiff's ERISA claims were frivolous," and despite Plaintiff's affidavits showing he cannot register for work at Defendants' hiring hall in that "murder capital" because of physical danger - for suing them in federal court over their theft of his wages - held he "therefore is well situated to pay the requested fees and costs" (Apx 45).

Its ***Deterrent effect***, admitted to be "generally only considered relevant when ... award[ing] fees to a prevailing ERISA plaintiff" was used to again beg its "frivolous" and "unfounded" questions, and an unsupported conclusion to add its own "retribution" factor to the five King/Eaves factors.

A ***Common benefit*** section overrode other courts' caution ("no apparent common consensus") to rule "if a fee award is denied, the participants and beneficiaries will ultimately bear the burden of the cost of this litigations."[4]

The ***Relative Merits*** section continued begging that "frivolous" question, and the *ad hominem* attacks on Plaintiff. The court's "**B. ANALYSIS**" invalidly concluded,

> "Balancing [sic] the above five factors favors an award of fees to Defendants. Bad faith and ability to pay ... weigh in favor of Defendants for the reasons that Plaintiff's claims were based on assertions of fact that were not supported by the record. It appears that Plaintiff acted without regard for the merits of his claim."

(Apx 49). Fictional ***Bad faith*** "frivolous" nonsense was repeated to state, "the facts of the case support an award," and the court threw in nine pages of inapposite boilerplate and increased "fees" by the amount of "costs" it pretextually denied the Defendants.

The appeal court misrepresented that: Plaintiff was an ERISA participant; his response to a fees motion was late; his claims are "frivolous," and will be deterred by a "common benefit" award.

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[4] One reason PLAINTIFF doesn't want his wages stolen by the Funds is codified in the Declaration of Findings, Purposes, and Policy of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") § 2 (29 U.S.C. 401), citing to "instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct ... as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives .... which distort and defeat the policies of the Labor Management Relations Act [§ 302, the Paycheck Protection Law] ...." See LMRDA § 3(o) for "member."

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to review the circuit's affirmation of a baseless district court attorney fees award, and because of its new abuses of different law and facts to review its affirmation of takings from union non-members' wages in Petition No. 02-920.

The district court used a same format to distort the law and to misrepresent facts that it used in the case-in-chief, and the result is chaos, supported by its invalid reasoning patterns of question-begging, *ad hominem* attacks, and *non-sequiturs*.

The "format" previously used to misrepresent the Plaintiff was a "member" of the Defendant Union subject to "taking" of wages for "union dues" (including its objectionable "political" and other spendings) because it is not a "state actor" - in the face of this Court's contrary decisions[5] - is again used to misrepresent,

> "Plaintiff's bad faith is evidenced by the fact that .... [his] motive in filing this lawsuit seems to have been for the purpose of furthering his personal political agenda with unions generally and Local 58 specifically."

Apx 44. The apolitical Plaintiff was never a Michigan resident.

It is impossible to ignore:

1) that Union Funds made no timely valid fees motion but district and appeal courts distorted the facts to validate a three-months-late "amendment," which they called a "Supplement";
2) that the ERISA fees award is to punish Plaintiff for a personal political agenda that exists only in the district court's mind;
3) that Plaintiff was never an "ERISA participant" or beneficiary;
4) and that the court misunderstood or distorted the "five factors" necessary to consider such ERISA § 502(g)(1) fees awards.

FIRST, contrary to district court's striking Plaintiff's timely-filed "Response" to Funds Defendants' months-late, amended fees

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[5] *Cf.*, *Communications Workers of America v. Beck*, 487 U.S. 736 (1988), *citing Machinist v. Street*, 367 U.S. 740 (1961).

motion, his *Response* necessarily examined the same case-law but reached different conclusions than district court's flawed Order awarding fees. *Cf., Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991), which district court plagiarized and distorted for its own political agenda (Apx 41-54).

The district court is clearly a product of "political patronage," rather than the *Horatio Alger* myths (of self-discipline and merit), as shown by its "Conclusion" (sic) in the case-in-chief:

> For the foregoing reasons, THE COURT GRANTS the Funds and Mittelbrun filed a Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative, Summary Judgment **[document 9]** and the Local 58 and Radjewski filed a Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative Summary Judgment as to Counts I-V of Plaintiff's Complaint **[document 12]**.

Apx 37. The court's bias and partiality is obvious in self-serving nonsense about the Plaintiff's "political agenda with ... [Detroit] Local 58 specifically," where it acknowledged on the same page, in its n.2, that he filed two "similar lawsuits against union locals in California and Ohio" that stole his wages (Apx 43).[6]

SECOND, the district court **struck** Plaintiff's July 29, 2002 "Response" to Defendants' motion for fees, citing Local Rule 7.1 (d)(2)(B), which, as that court admitted in its order,

> requires that a response to a *nondispositive* motion be filed within 14 days after service of the motion. (Emphasis added.)

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[6] A reactionary Democrat appointee presiding over that California case was recently picketed at the courthouse by jurors he abused for his own agenda. Plaintiff exhausts all alternatives before resorting to courts that now almost all resemble the ignoble judge Taney of *Dred Scott* infamy. The Ninth Circuit observed that Plaintiff sues only over ethical issues in *Moore v. Fischbach & Moore, Inc.*, 53 F.3rd 1053 (9th Cir. 1995).

Apx 40. The appeals judge wrote he denied Plaintiff's appeal,

> "Because Moore failed to timely respond to the defendants' motion ... he has waived any objection ... to the district court's award ...."

Apx 60.

However, that ruling depends on semantical sophistry because the district court did not act on an April 1, 2002 fees motion until it sent Defendants a July 8, 2002 helpful-hints letter stating,

> "A fee applicant **is required** to include with such a request background information for each billing attorney and independent evidence of the market rate .... **Without this information the Court is unable to assess** the reasonableness of the rates charged by Defendants' counsel .... Therefore, the Court requests that Defendants ... supplement their Motion with **the necessary information** ...."

Apx 39.[7]

That ostensible "necessary information" was filed as a "First Supplement" to that defective "Motion" on July 15, 2002 and the Plaintiff filed a Response and supporting Affidavit July 29, 2002. Aside from the two judges and Defendants' semantical tricks, and even aside from the fact that the controlling Rule the judge cited stated the motion is **nondispositive**, it is not reasonable to **strike** a timely Response to a defective supplemented motion, but hold Plaintiff to an Orwellian "doublespeak" standard it could not meet. That court admitted it was unable to assess the "necessary information" that was "missing" from the April 1, 2002 motion.

THIRD, there is no basis for a fees award against Plaintiff under ERISA because Plaintiff was not a "participant" and wasn't a "beneficiary" of the three Defendant Funds within the meaning of ERISA, those Funds' wrongful "takings" from his wages are

[7] Defendants' then euphemistically named the three-months-late motion a "Supplement" as the court's improper *ex parte* letter had (Apx 39).

"upstream" from ERISA and illegal "takings" cannot legitimately relate to the ERISA Funds. A state law, and therefore a cause of action, is not preempted by ERISA unless it "relates to," and "purports to regulate" that Fund within the meaning of ERISA § 1144(c). *See Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d at 552-53, n.1 (6th Cir. 1987).

The wrongs done here by abuses of judicial power also cannot be made right by appealing to "ERISA," which, **not incidentally**, covered only three Pension, Annuity and Health Welfare Funds as per LMRA § 302(c)(5)(A), but not other Funds Defendants. *See N.L.R.B. v. Amax Coal Co.*, 453 U.S. 321 (1981).

Further, the Funds exist only on monies negotiated with CBA employers as "hourly wages," rather than as negotiated benefits, and portions of wages are then "deferred" to the Funds only after Union "members" collectively vote to do so in Union "closed-to-non-members" meetings. But such intra-union voting may not be used to "take" monies from the wages of "non-members" also in a CBA "bargaining unit" Defendant Union is certified by Federal law to exclusively "represent" fairly and nondiscriminatorily.[8]

Because those three ERISA Funds Defendants "take" deferred (sic) "required contributions" (sic) from wages, they are required by the Internal Revenue Service to meet qualifications to exist as *Voluntary Employees' Beneficiary Funds* under Internal Revenue Code § 501 before receiving "voluntary," direct, tax-free deposits from their earned wages to the workers' individual accounts.

Plaintiff never "voluntarily" gave any of the Funds Defendants any monies, and he never received any "benefit" from any Funds for monies "taken" from his wages by Union Funds' Defendants.

Even in actions other than one where ERISA fiduciaries sued successfully to enforce employers' obligations to make payments to a multiemployer plan there is no presumption as to whether

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[8] Funds take "required contributions" from non-members by the threats of loss of their jobs and/or physical violence, and buy protection from corrupt politicians, and judges with contributions to Political Action Committees, and political candidates who have their "political" allies appointed to government jobs, as here, where the district court dishonestly ruled the Union is not a "state actor" to protect its "takings" (and cited two civil rights cases to legitimize abuses of the Constitution).

such attorney's fees will be awarded. *Folstice v. Guardian Products, Inc.*, 98 F.3d 933 (6th Cir. 1996), *cert. denied*, 520 U.S. 1143, 117 S.Ct. 1312, 137 L.Ed.2d 475 (1997). ERISA § 502(g)(1) (29 U.S.C. § 1132(g)(1)).

Neither the American nor the English Rule governs attorney's fees questions in ERISA cases, other than where such a fiduciary sues successfully to enforce an employer's obligation to pay into a multiemployer plan (and there such awards are mandatory under ERISA § 502(g)(2) (29 U.S.C. § 1132(g)(2)).

In non-mandatory cases like the instant case, the Sixth Circuit recognizes no presumption on whether fees will be awarded, and in *Folstice*, where, like here, the plaintiff's case was dismissed, the Sixth Circuit decided the defendant's position to be "**no more devoid of merit than any other losing litigant.**" *Id.*, at 938-39, *citing Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991), ERISA § 502(g)(1), and the five *King/Eaves* factors.

In *Christenberg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978) the Supreme Court, when denying fees to a prevailing defendant, underscored that **under very few circumstances is a defendant to be awarded attorney fees**, while it acknowledged that the court has discretion to assess fees when a plaintiff's action is frivolous, unreasonable, and without foundation:

> "Congress has provided only limited exceptions to this rule 'under selected statutes granting or protecting various federal rights.'"

Id., at 415, *citing Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 260, 95 S.Ct. 1612, 1623, 44 L.Ed.2d 141 (1976).

The Sixth Circuit rejected a decision that fees ought to be awarded as a rule even to prevailing plaintiffs under ERISA § 1132(g)(1), in *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984), and instead acknowledged the "American Rule" limits the power of federal courts to shift fees in the absence of a federal statute authorizing it. *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1301 (6th Cir. 1991) ("[T]he courts have no 'roving authority ... to allow counsel fees as costs or otherwise whenever the courts might deem them warranted'"),

citing Alyeska Pipeline Co. v. Wilderness Society, at 259.

That Sixth Circuit court went on to decide,

> "We conclude therefore that the district court strayed from the mark when it asserted that the purpose of fee-shifting under ERISA was primarily punitive. The punishment of bad faith litigants is a legitimate purpose under ERISA, but not the only purpose. *See New York Cent. Teamsters Pension Fund*, 506 F.Supp. 180, 182 (W.D.N.Y. 1980) (purpose of fee shifting under ERISA is to "enable pension claimants to obtain competent counsel and to distribute the economic burden of litigation in a fair manner"). (Citations omitted.)

Armistead v. Vernitron Corp., 944 F.2d 1287, at 1304.

Broad wording in ERISA's fee-shifting provision permits the courts to award attorney fees, and to consider "five factors," but the Union Funds Defendants showed no valid finding in an Order dismissing this action that the action is "**more devoid of merit than that of any other losing litigant.**" It is not devoid at all.

FOURTH, the district court constantly cited "Per Defendants" for its invalid factual findings related to the five *King/Eaves* factors to be considered as guidelines for discretionary awards of fees under ERISA § 502(g)(1), and Defendants' "assert[ions]" for question-beggings related to case-law misrepresentations, and the relevance of its "findings" (see pp. 5-6, *supra*, and Apx 43-49).

However, the court's consideration of the five factors found,

> "bad faith and ability to pay, the first and fifth factors, weigh in favor of Defendants for the reason that Plaintiff's claims were based on assertions of facts that were not supported by the record."[9]

No specifics are given and it is ironic that the court stayed all Plaintiff's timely-filed interrogatories, and requests for production

[9] The fifth factor is "the relative merits of the parties positions."

of documents to support the "facts," in the face of his Affidavits.

The court said it did not "have sufficient information to decide the second factor -- whether Plaintiff has the ability to pay an award of fees" but then "simply proceed[ed] with an award without considering th[at] second factor ...." (but see *Cowden, infra*).

It acknowledged the third factor is only "considered relevant when deciding whether to award fees to a prevailing ERISA plaintiff," but stated, "an award of fees against Plaintiff could deter other [sic] plan participants from filing frivolous claims."

The fourth factor, "whether Defendants [sic] sought to confer a common benefit on all participants and beneficiaries of their ERISA plans or resolve significant legal questions" was applied by ruling "There were no significant legal questions at issue," and ruled, "Based on the foregoing, the facts of this case support an award of attorney fees to Defendants [sic]" (Apx 47-48).

The district court then denied "costs" to the Funds Defendants but inflated that attorneys' fees award by an amount that awarded costs it salutarily denied, and after rambling on gratuitously for another eight pages finally concluded its "format" again.

Because the court misrepresented in the case-in-chief: that the Union and its "special purpose funds" were not "state actors" (in the face of this Court's decision in *Communication Workers of America v. Beck*, 487 U.S. 735, 106 S.Ct. 2641, 101 L.Ed.2d 634 (1988)); that Plaintiff was a "member" of Defendant Union to deny him relief from takings of his property (the appeal court held he isn't a member); and now, that he is a "participant" in Union Funds' ERISA and/or IRS regulated Voluntary Employees' Beneficiary [special purpose funds] (*see Beck*, at 487 U.S. 735, 752, n.7) to again deny him constitutional relief, the court abused its discretion by awarding Funds punitive, inflated unreasonable post-judgment attorneys' fees under ERISA § 502 (g)(1), despite its, and the Union Funds' bad faith. *See Cowden v. Montgomery County Society for Cancer Control*, 653 F.Supp. 1052 (S.D.OH. 1986) - which the court misrepresented as authority for a decision to "simply" award fees - (fees denied even where plaintiff and his lawyer were put on notice claims had no merit, and are frivolous to the extreme), *citing Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1355-56 (explicitly declining to even discuss whether an ERISA defendant may get a fees award).

APPENDIX

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Employees' Retirement Income Security Act

Sec. 502(g)(1). (29 U.S.C. § 1132) In any action under this subchapter by a participant, beneficiary, or fiduciary [as authorized generally by § 1132], the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

Labor Management Relations Act

Unfair Labor Practices

Sec. 158(a)(3). (29 U.S.C. § 158) It shall be an unfair labor practice for an employer - by discrimination in regard to hire or tenure or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Labor-Management Reporting and Disclosure Act

Declarations of Findings, Purposes, and Policy:

Sec. 2(b). (29 U.S.C. 401) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplemental legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce ....

Definitions: Sec. 3(o). (29 U.S.C. 402)

For the purposes of titles I, II, III, IV, V (except § 505), and VI of this Act - "Member" or "member in good standing" when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership ....

Title I - Bill of Rights of Members (29 U.S.C. 411):

Sec. 101(a)(1). Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections ..., to attend membership meetings and to participate in the deliberations and voting ... subject to reasonable rules and regulations ....

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Lawrence Moore	)	Case No. 01-72222
	)	
Plaintiff,	)	
v.	)	Order Setting Status
	)	Conference And For
Int. B'hood of Elect.	)	Response To Motions
Wkrs. Local 58, *et al*,	)	To Dismiss, And For
	)	Summary Judgment
Defendants.	)	

IT IS ORDERED that plaintiff file a response to Defendants' IBEW Local 58 and Jeffrey Radjewski's Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative Summary Judgment as to Counts I-V of Plaintiff's Complaint, filed November 19, 2001, by Friday, December 14, 2001.

IT IS FURTHER ORDERED that a Status Conference will be held by telephone on Friday, January 4, 2002 at 11:00 a.m. The Court will initiate the conference call.

IT IS SO ORDERED.

Filed: NOV 29, 2001

Victoria A. Roberts
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Lawrence Moore	)	Case No. 01-72222
	)	
Plaintiff,	)	
v.	)	Order
	)	
Int. B'hood of Elect.	)	
Wkrs. Local 58, *et al*,	)	
	)	
Defendants.	)	

Defendants The International Brotherhood of Electrical Workers, Local 58 ("Local 58") and Jeffrey Radjewski filed a Motion For Protective Order (Doc #24). Based on a telephone conference held on January 4, 2002 and attended by Lawrence Moore representing himself, Patricia Fabrizio representing the IBEW Local 58 Funds and Thomas Mittelbrun, and John Adams representing Local 58 and Jeffrey Radjewski, this motion is deemed WITHDRAWN. Mr. Moore agrees that discovery should be held in abeyance pending the outcome of dispositive motions which are pending.

IT IS SO ORDERED.

Filed: JAN 7, 2002

Victoria A. Roberts
U.S. District Judge

December 12, 2000
Jeff Radjewski, Business Manager IBEW Local 58
1358 Abbott Street
Detroit, MI 48226-2460

Re: Moore v. IBEW Local 58, U.S.D.C. No. 01-72222.

Dear Sir:

I wrote to you on October 15, 2000 rescinding a "Payroll Deduction Authorization" you had me sign when I accepted a job with Triangle Electric Inc. on 9-15-00 (I also asked you to inform that employer) and requested names of all Sub-pay Fund trustees and administrators and all documents describing the legal makeup and operation of that entity, including all of the bases for participation, qualification and for receiving benefits. I also referred to my October 5, 2000 letter to an administrator of all Local 58's "Trusts," "Funds," and "Committees" funded by deductions from gross wages I earned when I worked under your collective bargaining agreement (enclosing a copy of that letter to your administrator). You did not reply.

Triangle Electric continued to deduct 3% of my gross wages. Please refund all "Union Working Dues" deducted from paychecks by Triangle Electric, and by Hall Engineering. I am not a member of Local 58.

Please consider this to be a request for your direct re-payment to me of any and all monies deducted from my wages to fund any of the joint trusts and/or committees identified in collective bargaining agreement(s), Bylaws, and constitutions, which Local 58 is a party to (including that Sub-pay fund), and I also want all my monies which you have sent to Washington, D.C. based International Brotherhood of Electrical Workers refunded, including specifically, deductions for a Labor-Management Coop Committee(s) (including all the monies deducted from my wages when I worked for Hall Engineering in 1998).

Thank you for your cooperation.

Sincerely,
Lawrence Moore

January 2, 2002
To: Duane F. Ice
Martens, Ice, Glass, etc.
17117 West Nine Mile Road, # 1400
Southfield, MI 48075
Ph. (248) 559-2110

Re: Moore v. IBEW Local 58, U.S.D.C. No. 01-72222.

Dear Sir:

Your letter dated December 28, 2001 requesting agreement to extend the time period for responses to my First Set(s) Of Interrogatories and First Request(s) For Production of Documents to Defendants Jeff Radjewski and Local Union 58 until January 18, 2002 on grounds this case may be dismissed on January 4, 2002 has been received. All of the responses to discovery requests are due on January 5, 2002. It seems that you decided to dedicate Local 58's resources to requests for "protective" orders (complete with *ad hominem* attacks you first began in your motions to dismiss) rather than answers and responses to the discovery requests. I note for the record that your letter, and your motion for protective order emanated from your offices on the same date.

In the future I will not agree to any such extensions of time based on personal attacks, however, other than the caveat of any contrary ruling by the presiding judge on January 4, 2002 I will tentatively agree to your current request for extension of time to January 18, 2002. Please send a proposed stipulation in the future.

The agreement to extend time was telephoned to Ms. Debra Krell of your office this morning, after I was informed that you were "with a client," and John Adams was not available.

Thank you for your cooperation.

Sincerely,
Lawrence Moore

February 19, 2002
Sachs Waldman
1000 Farmer Street
Detroit, MI 48226-2899
Ph. (313) 965-3464

Hon. Victoria Roberts
United States District Court
231 W. Lafayette Boulevard
Detroit, MI 48226

Re: Moore v. IBEW Local 58, U.S.D.C. No. 01-72222

Your Honor:

On behalf of these Defendants, we filed a Motion For Dismissal For Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative, Summary Judgment on October 29, 2001. The hearing was held January 4, 2002 on this Motion and on the Motion of the other defendants for summary judgment. Your Honor indicated at that hearing (held telephonically) that a decision would be promptly rendered.

Since that time, plaintiff has filed a motion to transfer this and two unrelated matters to the Multidistrict Litigation Panel, to which defendants have responded at considerable cost. That motion has now been scheduled for hearing in Tucson, Arizona on March 21, 2002, which will involve additional considerable costs.

I write to inquire as to the status of the Motions pending before the Court and to respectfully request that your Honor, if possible, expedite the rendering of a decision, which might help to minimize the continuing costs to defendants in defending what is undoubtably a meritless and frivolous action.

Sincerely,
Patricia J. Fabrizio

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Lawrence Moore Plaintiff, v. Int. B'hood of Elect. Wkrs. Local 58, *et al*, Defendants.	Case No. 01-72222 Order Granting Dismissal and Summary Judgment In Favor of Defendants

I. Introduction

On June 13, 2001 Plaintiff filed his lawsuit against the International Brotherhood of Electrical Workers Local 58 ("Local 58"), Jeff Radjewski, Thomas Mittelbrun, and several fringe benefit funds ("the Funds").[1] The Funds and Mittelbrun filed a Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative, Summary Judgment on October 29, 2001, and the Local 58 and Radjewski filed a Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative Summary Judgment as to Counts I-V of Plaintiff's Complaint on November 19, 2001. For the reasons that follow, the Court will grant the Motions.

II. Background

During the relevant time period, Plaintiff was a member of the International Brotherhood of Electrical Workers ("IBEW") Local No. 8 in Rossford, Ohio (*Local 58 Br.* at Ex A). Perhaps

[1] According to Defendants the proper legal names for the Funds are IBEW Local 58 Annuity Fund, Electrical Workers' Pension Trust Fund of Local Union # 58, I.B.E.W., Detroit, Michigan; Electrical Workers Insurance Fund; Apprentice and Journeyman Training Trust of the Electrical Industry, Detroit, Michigan; Southeastern Michigan Electrical Industry Labor Management Cooperation Trust Fund; Supplemental Unemployment Benefit Plan of the Electrical Industry, Detroit, Michigan; Electrical Workers Joint Board of Trustees Vacation Fund.

The Funds further state that there is no legal entity known as the Electrical Workers' Joint Board of Trustees. Rather, that term is used to collectively describe the fringe benefit funds established by Local 58's collective bargaining agreement, the International Brotherhood of Electrical Workers, and the Southeastern Michigan Chapter of the National Electrical Contractors Association.

because of that membership, he was able to obtain "job referrals from an electrical contractors' Hiring Hall created by the collective bargaining agreement ('CBA') between Defendant LOCAL 58 and Detroit area electrical contractors" (*Complaint* at ¶ 3). Like Local 8, "LOCAL 58 ... is affiliated with Intern'l B'hood of Elect. Wkrs ...." (*Complaint* at ¶ 4).

Perhaps because of Local 58's affiliation with IBEW, Plaintiff was allowed to sign a Pension Reciprocity form that would allow contributions made to the benefit funds on Plaintiff's behalf to be sent to his Local 8 funds. (See *Local 58 Br.* at Ex A). But, when Plaintiff worked under Local 58's jurisdiction in July 1998, he did not complete the reciprocity form. He did not realize this error until 2000. On July 14, 2000 Plaintiff wrote a letter to the business manager of Local 58 explaining that he had previously "forgotten to come back and fill out reciprocity forms," and asking that the contributions now be sent to the Local 8 funds. (*Id.*) That request was denied by the Board of Trustees of the Electrical Workers' Pension Trust Fund. Thomas Mittelbrun III, the administrator of the fund, explained in a September 13, 2000 letter to Plaintiff that his "request was denied due to it being made outside the time limit of one year allowed by the Plan." (*Local 58* Br. at B).

Two days later, on September 15, 2002 Plaintiff received a referral from Local 58 to performance work for Triangle Electric Company. At the bottom of the relevant referral card there is a section that states in bold and relatively large type, "PAYROLL DEDUCTION AUTHORIZATION." Underneath the card states:

> I authorize the above Employer to deduct from my paycheck, the Union Working Dues, as stated and required in the amount fixed in the Bylaws of the Local Union 58, IBEW, and remit same to said Local Union in accordance with the terms set forth in the Bargaining Agreement between the NECA Chapter Southeastern Michigan and Local Union 58, IBEW.

(*Local 58 Br.* at Ex. C). Plaintiff signed the referral card on the line directly below that paragraph. (*Id.*)

It appears likely that Plaintiff signed the referral card before he received the September 13 denial letter from Middleton because, in a letter dated September 15, 2000 he angrily attempted to rescind the payroll deduction authorization. (*Local 58 Br.* at Ex. D). That September 15 letter was sent to Jeff Radjewski, the Local 58's business manager. Plaintiff began the letter by accusing Radjewski of "illegally screwing" him out of his job in July 1998 when he was laid off. (*Id.*) He continued the letter by stating that, in response to his request to have his 1998 pension fund "deductions"[2] sent to his home funds, Radjewski "blew [him] off with an abusive, intrusive letter from your Pension Trust administrator who attached a pretentious suffix to this name ...." (Id.) Plaintiff stated to Radjewski:

> I have no idea why you are so chicken-hit in stealing my 80 Pension credit-hour deductions ..., but whatever caused it is also causing my following reactions.
>
> I am hereby rescinding that "dues check-off authorization" I signed when I accepted a job-offer from Triangle Electric Co. on 9/15/00. Please inform my employer immediately and please also send me names of all "Sub-pay" Fund trustees and administrators and all documents describing the legal make-up and operation of that entity ....

(*Id.*)

What is important to note from the above letter is that Plaintiff did not indicate to Radjewski that he mistakenly or unknowingly signed the dues deduction authorization. He does not state that he was tricked. Rather, he stated that he wanted to rescind that authorization in response to the decision to deny his request to have his 1998 pension benefits transferred to his home fund.

---

[2] As will be explained *infra.*, Radjewski maintained that there were no pension *deductions* from Plaintiff's paycheck. Rather, the employer had made pension *contributions* over and above Plaintiff's pay.

A more friendly letter dated September 15, 2000 was sent from Plaintiff to Frank Demers of Local 58. (*Local 58 Br.* at Ex. E). He explained that his recent review of his records revealed that he had forgotten to fill out and return a reciprocity form for the 80 hours he worked under Local 58's jurisdiction in 1998. Plaintiff asked Demers for help. (*Id.*)

On December 12, 2000 Plaintiff wrote another letter to Radjewski complaining that Radjewski had never responded to his earlier letter and that the dues were still being deducted from his wages. Plaintiff asked Radjewski to refund all the dues that had been deducted. (*Local 58 Br.* at Ex. F).

Radjewski responded on January 2, 2001, acknowledging that he had not responded to Plaintiff's earlier letter. He reasoned, "If you want a civil reply write a civil letter." (*Local 58 Br.* at G). Radjewski further stated that Plaintiff would need to notify his employer if he wanted to cancel his payroll deduction authorization. He informed Plaintiff that Local 58 could not start or terminate a payroll deduction on its own. Moreover, Radjewski stated, since Plaintiff was a member of the IBEW he was not entitled to a refund of all dues and benefit fund contributions. "On the contrary, you are required to meet all member obligations, includes those obligations imposed by Local 58's collective bargaining agreement with its employers under which you worked and got paid." (*Id.*) In the interest of the entire IBEW membership, it was Radjewski's duty to uphold the obligations imposed by the Local 58 collective bargaining agreement "under which you worked and got paid." (*Id.*) Radjewski additionally explained, "Benefit contributions are not deductions from your wages. They are separate obligations, in addition to wages, that the employers must meet pursuant to the collective bargaining agreement." (*Id.*)

In response to Radjewski's January 2 letter Plaintiff for the first time accused the managers of the hiring hall of tricking him into signing the payroll deduction authorization. (*Local 58 Br.* at H). In his January 19, 2001 letter Plaintiff stated that his membership with the IBEW was unrelated to the Local 58's request to take money from his wages and that he had no obligation to pay the dues, and accused Local 58 of having engaged in theft. (*Id.*) Plaintiff demanded that all deductions

from his 1998 and 2000 wages be returned to him. (*Id.*)

Radjewski wrote back to Plaintiff on March 5, 2001 and denied that Plaintiff had been tricked. (*Local 58 Br.* at I). The referral card had the authorization on it in plain sight and Plaintiff signed it. Further, "[p]aying working dues is a member's obligation and, as I understand it, you are still an IBEW member with Card No. D295652." And, the benefit contributions that were paid by the employer were owed pursuant to the collective bargaining agreement - the same collective bargaining agreement that entitled Plaintiff to wages from his employer. (*Id.*) Moreover, Radjewski explained:

> Our arrangement on these issues are the same as other locals around the country. You and all IBEW members receive the advantages of these arrangements. As I told you previously, I am required to uphold the IBEW constitution and our collective bargaining agreement. These monies are not "stolen by minority votes at union meetings" as you claim.
>
> Even if there were to be a refund of benefit contributions, any such refund would go back to the employer who paid them, not you. The reason is that benefit contributions are not deductions or "theft," as you call it, from your gross wages. The wages are entirely separate from the benefit contributions paid by employers.

(*Id.*)

Plaintiff's April 5, 2001 letter revealed that he was undeterred. He continued to seek the 80 credit-hours of pension contributions that he insisted were stolen from his paycheck. And, he continued to insist that he owed no dues to the Local 58 because he was not a member of that organization. The deduction of dues was according to Plaintiff taxation without representation because he had no voice or vote in Local 58. (*Local 58 Br.* at Ex. K).

This lawsuit followed. As described below the Court finds that Plaintiff's allegations either fail to state a claim or are not supportable by the evidence.

III. ANALYSIS

A. Standards of Review

Defendants' Motion is partially filed pursuant to Fed.R.Civ.P 12(b)(6). When reviewing a Rule 12)b)(6) Motion the trial court "must construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994); *see also Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). Because a Rule 12(b)(6) motion rests upon the pleadings rather than the evidence, "[i]t is not the function of the court [in ruling on such a motion] to weigh evidence or evaluate the credibility of the witnesses." *Miller*, 50 F.3d at 377. The court should deny a Rule 12(b)(6) motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Gazette*, 41 F.3d at 1064; *see also Miller*, 50 F.3d at 377; *Vemco, Inc. v. Camardela*, 23 F.3d 129, 132 (6th Cir. 1994). While this standard is decidedly liberal, it requires more than the bare assertion of legal conclusions. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1249 (6th Cir. 1993). Rather, the complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory. *DeLorean*, 991 F.2d at 1240.

Defendants also rely upon Fed.R.Civ.P. 56(c). Under Rule 56(c) summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Copeland v. Machulis*, 57 F.3d 476, 478 (6th Cir. 1995). A fact is "material" and precludes a grant of summary judgment if "proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle[s] of law to the rights and obligations of the parties." *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984). The court must view the evidence in the light most favorable to the nonmoving party and it must also draw all reasonable inferences in the nonmoving party's favor. *Cox v. Kentucky Dept. of*

Transp., 53 F.3d 146, 150 (6th Cir. 1995).

The moving party bears the initial burden of showing that there is no genuine issue of material fact. *Snyder v. AG Trucking Co.*, 57 F.3d 484, 488 (6th Cir. 1995). To meet this burden the movant may rely on any of the evidentiary sources listed in Rule 56(c). *Cox*, 53 F.3d at 149. Alternatively, the movant may meet this burden by pointing out to the court that the nonmoving party, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case, and on which that party will bear the burden of proof at trial. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937 (6th Cir. 1995); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989). Thus, a motion for summary judgment is a means by which to challenge the opposing party to "put up or shut up." *Cox*, 53 F.3d at 149; *Street*, 886 F.2d at 1478. The moving party does not, however, have to support its motion for summary judgment with evidence negating its opponents claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985).

Once the moving party has met its burden, the burden shifts to the nonmoving party to produce evidence of a genuine issue of material fact. Rule 56(e); *Cox*, 53 F.3d at 150. The nonmoving party cannot rest on its pleadings, but must present significant evidence in support of its complaint. *Copeland*, 57 F.3d at 479. The mere existence of a scintilla of evidence to support the nonmoving party position will be insufficient; there must be evidence on which a jury could reasonably find for the non-moving party. *Snyder*, 57 F.3d at 488; *Tolton*, 48 F.3d at 941.

B. Count I

Plaintiff's first count alleges, against all Defendants, a violation of his First Amendment Rights of Free Speech and Association and a Fifth Amendment taking without due process. This Count includes a litany of allegations, including that the Local 58 refuses to allow non-members any voice or vote on the collective bargaining agreement; has no right to deduct dues from non-members under the CBA; and requires electricians who accept jobs at the hiring hall to sign a job acceptance form which includes a payroll deduction authorization in fine print. Plaintiff

contends that he was not told that the payroll deduction authorization was on the job acceptance form, but that Local 58 nonetheless took three percent of his wages; that Plaintiff was given no vote on participating in the Funds, but that Defendants took monies from Plaintiff for nonexistent, unavailable benefits; that Defendants also took monies from Plaintiff by agreeing that he receive reduced rates of pay for overtime work; and that the Local 58 refused to honor Plaintiff's rescission of his dues deduction authorization. Further, Plaintiff alleged:

> 37. At least some of the monies deducted from the PLAINTIFF's wages by Defendants TRUST and FUNDS are expended for political or for lobbying activities not directly related to work conditions, or community services, union organizing, foreign affairs, publicity or public affairs, given to Political Action Committees, or to support political candidates, parties, causes, and TRUST Defendant NATIONAL ELECTRICAL BENEFIT FUND illegally funnelled millions of dollars to political parties and politicians, causing one Trustee to resign.
>
> 38. Defendant UNION similarly expended funds for political or for lobbying activities not directly related to work conditions and gave to community services, union organizing or foreign affairs and publicity or public affairs, and to Political Action Committees and to support political candidates, parties, and causes.

(*First Amended Complaint* at 4-6).

Apparently Plaintiff included the allegations set forth in paragraphs 37 and 38 in order to have his Complaint fall within *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). Plaintiff cited that case in correspondence to Radjewski and deems that the most relevant authority for this Court to review. Having reviewed *Beck*, the Court finds that *Beck* does not support Plaintiff's claim. To the contrary, it highlights

congressional efforts to discourage what Plaintiff is attempting to accomplish here, which is to reap the benefits that Local 58 has negotiated with employers but to escape contributing financially.

In *Beck* the Court framed the issue before it as follows:

> Section 8(a)(3) of the National Labor Relations Act of 1935 (NLRA), 49 Stat. 452, as amended, 29 U.S.C. § 158(a)(3), permits an employer and an exclusive bargaining representative to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues and initiation fees as a condition of continued employment, whether or not the employees otherwise wish to become union members. Today we must decide whether this provision also permits a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment, and, if so, whether such expenditures violate the union's duty of fair representation or the objecting employees' First Amendment rights.

Id. at 738.

The plaintiffs in *Beck* were employees of AT&T who chose not to become union members. They challenged the union's collection of "agency fees" from them to the extent that the fees were used for purposes other than collective bargaining, contract administration, or grievance adjustment, which the *Beck* Court denoted "'collective- bargaining' or 'representational" activities.'" *Id.* at 739-740. The plaintiffs specifically challenged their fees being used for the "organizing the employees of other employers, lobbying for labor legislation, and participating in social, charitable, and political events ...." *Id.* at 740. They claimed that the use of their fees for such purposes violated their rights under § 8(a)(3 of the NLRA and the First Amendment. *Id.*

To determine whether the use of the plaintiffs' fees for the challenged activities violated § 8(a)(3) the Court reviewed the

structure and purpose of § 8(a)(3). Its examination revealed that the drafters of that section had two aims in mind. One aim was to eliminate the barrier created by closed union shop agreements, i.e., agreements that required an employer to hire only persons who were already union members. *Id.* at 748. An equally significant goal was to prevent nonunion members from getting a free ride. *Id.*

> As Senator Taft, one of the authors of the 1947 legislation, explained, 'the argument ... against abolishing the closed shop ... is that if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay dues rides along freely without any expenses to himself.' 93 Cong.Rec. 4887 (1947), Leg.Hist. 1422. Thus the Taft-Hartley Act was 'intended to accomplish twin purposes. On the one hand, the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop. On the other hand, congress recognized that in the absence of a union-security provision "many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost. *NLRB v. General Motors Corp.*, 373 U.S., at 740-741, 83 S.Ct., at 1458 (quoting S.Rep., at 6, Leg.Hist.412).

Id. at 748-749.

Thus, in enacting § (8)(a)(3), "'Congress recognized the validity of unions' concerns about "free riders," i.e., employees who receive the benefits of union representation but are unwilling to contribute their *fair share* of financial support to such union, and gave unions the power to contract to meet *that problem* while withholding from unions the power to cause the discharge of employees for any other reason.'" *Id.* at 749, (quoting *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954))(emphasis added in *Beck*).

The *Beck* Court concluded:

> Taken as a whole, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the 'membership' that may be so required has been 'whittled down to its financial core.' *NLRB v. General Motors Corp.*, 373 U.S. 734, 742, 83 S.Ct. 1453, 1459, 10 L.Ed.2d 670 (1963). The statutory question presented in this case, then, is whether this 'financial core' includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment. We think it does not.

Id. at 745.

In this case Plaintiff stands in much different shoes than the plaintiffs in *Beck*. Unlike the *Beck* plaintiffs, Plaintiff *is* an IBEW member. Plaintiff highlights the fact that he is not specifically a member of Local 58, but he also admits that Local 58 "is affiliated with Intern'l B'hood of Elect. Wkrs." (*Amended Complaint* at ¶ 4). Indeed, Plaintiff emphasizes that he has a contractual relationship with Local 58, and sites the IBEW Constitution at Article XX in support,

> Sec. 3 The acceptance of an application for membership, and the admission of the applicant into any L.U. of the I.B.E.W., constitutes a contract between the member, the L.U. and the I.B.E.W., and between such member and all other members of the I.B.E.W.

Thus, unlike the *Beck* plaintiffs, Plaintiff is not being forced to pay dues by virtue of § 8(a)(3). Plaintiff elected to become a member of the IBEW. Accordingly, the limitation that § 8(a)(3) places on use of nonmember dues is simply not implicated here.

Of equal significance, the *Beck* plaintiffs did not attempt to reap the benefits of the CBA but, at the same time, avoid making any financial contributions to the union. They objected only to

the use of their dues for expenditures outside of the union's collective bargaining and representational activities. In contrast Plaintiff here acknowledges that he "worked as an electrician via job referrals from an electrical contractors' Hiring Hall created by the collective bargaining agreement ("CBA") between Defendant Local 58 and Detroit area electrical contractors," and that he was "a 'third party beneficiary' to a CBA between UNION and employers which contains a job Referral Procedure and an 'out-of-work list." (*Amended Complaint* at ¶¶ 3 & 15). Despite reaping those benefits Plaintiff insists that the Local 58 had "no right" to deduct dues from his wages or other non-members of the Local 58. (Amended Complaint at ¶ 19).

Plaintiff's position is directly contrary to the purpose of § 8(a)(3) as explained by the *Beck* Court. One of the twin aims of § 8(a)(3) was to prevent those who choose not to join a union from getting a free ride. Employees who enjoy the benefits of the collective bargaining agreement and other core activities of the union must pay their fair share. Since § 8(a)(3) requires even nonunion members to contribute to the costs of the CBA Plaintiff's protestation that he does not have to pay dues because he does not have a voice or vote in the CBA is unavailing. And his desire to gain employment and earn wages as a beneficiary of the CBA, but to avoid the negotiated overtime arrangements cannot withstand scrutiny.

Plaintiff argues that his dues are used for political and other non-core union activities. That claim is unsubstantiated. Plaintiff's only evidence is a November 1992 *I.B.E.W. Local 58 Newsletter*, in which Local 58 opined that then presidential candidate Bill Clinton's track record was on track with that of the union's, and a October/November 2001 *IBEW Journal* in which it was reported that Local 58 contributed $21,500 of the $341,500 that the IBEW contributed toward an election in Oklahoma. (*Plaintiff's December 14, 2001 Affidavit* at Ex A & B). These letters do not evidence that the dues paid went to anything other than collective bargaining activities. The November 1992 newsletter did not report any financial contributions to political activity, and neither newsletter corresponded to the timing of Plaintiff's dues deductions.

Furthermore, Plaintiff's claims of constitutional violations are

both factually and legally without merit. Although the *Beck* plaintiffs claim rested in part upon the First Instead, the Court found that it "need not decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) involves state action." *Id.* at 761. This is important because "the conduct of private parties lies beyond the Constitution's scope in most instances ...." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 620 (1991). So *Beck* is really no support of Plaintiff's constitutional claim.

Plaintiff also cites *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). In that case the Court held that the employees' First Amendment rights were violated when they were required to contribute toward political causes that those employees opposed. "[T]he Constitution requires [] that [political] expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 235-236. But *Abood* has important distinctions from this case. First, the Abood case involved governmental employees, as the above quote indicates. Secondly, in *Abood*, the Court found the case to implicate the constitution because Michigan law sanctioned the use of nonunion members fees for purposes other than collective bargaining. *Id.* at 232. Hence, *Abood* involved both state actors and state action. Neither is present here.

Moreover, even though the *Abood* case involved state actions and state actors the court did not hold that the union was forbidden from participating in political activity. To the contrary the Court stated, "We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." *Abood* at 235. Rather, the Court held that those activities could not be funded with the dues of objecting employees. Thus, even if this case involved state action, Plaintiff's evidence that the Local 58 has been involved politically would have been insufficient to sustain his First Amendment claim. Plaintiff has not shown that his dues were used to fund political activities, much less any activities that he opposed.

The Court additionally notes factual allegations of Plaintiff's Count 1 that are unsustainable. Contrary to Plaintiff's claim otherwise, the dues deduction authorization was not submitted to Plaintiff in fine print. The phrase "PAYROLL DEDUCTION AUTHORIZATION" is the most prominent writing on the referral card that Plaintiff signed. (*Local 58 Br.* at Ex. C). Of further significance is the fact that Plaintiff did not initially claim that he was seeking a refund of his dues or to rescind his authorization because he was tricked into signing it. Rather, he specifically indicated that he wanted to rescind his authorization because his reciprocity form for his 1998 benefits was not honored; he wanted to rescind his authorization out of retaliation.

Furthermore, Plaintiff alleges that an unknown amount of benefits was taken from him. To the extent that Plaintiff means that Defendants deducted benefit payments from his salary, that allegation is directly contrary to the explanation that Radjewski gave to him. Radjewski repeatedly explained that benefits contributions are made from employers over and above the employees' wages. Moreover, to the extent that Plaintiff means that Defendants refused to send his 1998 benefits to his home fund, the record is clear that Plaintiff forgot to sign the reciprocity form until 2000. Thus, the benefits were not "nonexistent" or "unavailable," as Plaintiff contends. (*Amended Complaint* at ¶ 22). The benefits would have been sent to Plaintiff's home fund if he had timely submitted the reciprocity form.

At any rate, even if Plaintiff were able to sustain his factual allegations, they cannot support his First Amendment or Fifth Amendment claims because of the lack of state action.

C. <u>Counts II through V</u>

Plaintiff's additional counts are: Count II, for fraud and deceit; Count III, for breach of contract; Count IV, for breach of duty of fair representation; and Count V, for intentional infliction of emotional distress. The factual allegations described in Count I that have already been rejected form the basis of these latter counts, and Defendants are therefore entitled to summary judgment on Counts II through V.

Furthermore, the Court finds that the claims against the Funds in Counts II, III and V are preempted by ERISA, *see, Lion's*

Volunteer Blind Ind., Inc. v. Automated Group Admin., Inc., 195 F.3d 803, 807 (6th Cir. 1999), and that Plaintiff's allegations against the Funds does not state a claim under ERISA. Plaintiff has not shown that ERISA prohibits fringe benefits funds from collecting contributions for employment arising out of a CBA from employers with which the union has negotiated the CBA.

Moreover, Plaintiff's breach of duty of fair representation claim against Local 58 and Radjewski is barred by the NLRA's six month limitation period, which began when Plaintiff knew or should have known of Local 58's alleged breach of its duty of fair representation. *Schoonover v. Consolidated Freightways Corp. of Delaware*, 49 F.3d 219, 221 (6th Cir. 1995). Plaintiff alleges that, *inter alia*, Local 58 and Radjewski deducted union dues without Plaintiff's authorization and without legal authority. (*Amended Complaint* at 77). Plaintiff attempted to rescind his dues deduction authorization as early as September 15, 2000. Thus, Plaintiff knew about the alleged wrongful due deductions over six months before filing his June 13, 2001 Complaint. Further, Plaintiff's allegations of fraud and deceit, breach of contract and intentional infliction of emotional distress arise out of the same alleged wrongful conduct that underlies the breach of duty of fair representation claim, and are therefore also barred by the six month limitation period. *Maynard v. Revere Copper Products, Inc.*, 773 F.2d 733, 735 (6th Cir. 1985).

IV. Conclusion

For the foregoing reasons, THE COURT GRANTS The Funds and Mittelbrun filed a Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative, Summary Judgment **[document 9]** and the Local 58 and Radjewski filed a Motion for Dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative Summary Judgment as to Counts I-IV of Plaintiff's Complaint **[document 12]**.

Dated: MAR 18, 2002

Victoria A. Roberts
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Lawrence Moore	)	Case No. 01-72222
	)	
Plaintiff,	)	
v.	)	JUDGMENT
Int. B'hood of Elect.	)	
Wkrs. Local 58, *et al*,	)	
	)	
Defendants.	)	

In accordance with the Order entered on MAR 18, 2002, IT IS ORDERED that Judgment is entered in favor of Defendants.

Dated at Detroit, Michigan on MAR 18, 2002.

DAVID J. WEAVER
CLERK OF THE COURT

Victoria A. Roberts
U.S. District Judge

UNITED STATES DISTRICT COURT
For The Eastern District Of Michigan

Chambers of
VICTORIA A. ROBERTS
United States District Judge
July 8, 2002

Ms. Patricia J. Fabrizio
1000 Farmer Street
Detroit, Michigan 48226

RE: Defendants Funds and Mittelbrun's Motion for Attorney Fees and Costs
Case No. 01-72222

Dear Ms. Fabrizio:

Defendants Funds and Mittelbrun have filed the above Motion requesting an award of fees based upon the hourly rates charged by the individual attorneys who billed time in this case. A fee applicant is required to include with such a request background information for each billing attorney and independent evidence of the market rate in the community for "similar services by lawyers with reasonably comparable skill, experience and reputation." Blum v. Stevenson, 465 US 886, 895 n.11 (1984); See also Northcross v Board of Education Memphis City Schools, 611 F2d 624, 638 (6th Cir 1980). Without this information, the court is unable to assess the reasonableness of the rates charged by Defendants' counsel.

Defendants' Motion does not include any background information or evidence regarding the rates charged in the community. Therefore, the Court requests that Defendants Funds and Mittelbrun supplement their Motion with the necessary information, no later than July 15, 2002.

Very truly yours,
Chanille B. Carswell, Law Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Lawrence Moore	)	Case No. 01-72222
	)	
Plaintiff,	)	ORDER STRIKING
v.	)	PLAINTIFF'S RESPONSE
Int. B'hood of Elect.	)	TO DEFENDANTS FUNDS
Wkrs. Local 58, et al,	)	AND MITTLEBRUN'S
	)	MOTION FOR ATTORNEY'S
Defendants.	)	FEES AND COSTS

On April 1, 2002, Defendants Funds and Mittelbrun filed with the Court a Motion for Attorneys' Fees and Costs. Defendants' Proof of Service avers that a copy of the Motion was also served upon Plaintiff on April 1, 2002 by depositing the same in the United States mail, postage prepaid, to the same address on file with the court.

Local Rule 7.1(d)(2)(B) requires that a response to a nondispositive motion be filed within 14 days after service of the motion. Plaintiff, however, failed to file a response with the Court until July 29, 2002. The court rejects Plaintiff's tardy filing.

THEREFORE IT IS ORDERED, that Plaintiff's Brief in Response to Motion for Attorney's Fees accepted for filing on July 29, 2002 be stamped "STRICKEN" and deemed not a part of the record of this case.

Filed: AUG 06, 2002

Victoria A. Roberts
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Lawrence Moore	) Case No. 01-72222
Plaintiff,	) ORDER GRANTING IN
v.	) PART AND DENYING IN
Int. B'hood of Elect.	) PART DEFENDANTS'
Wkrs. Local 58, et al,	) MOTION FOR ATTORNEYS
Defendants.	) FEES AND COSTS

I. INTRODUCTION

This matter is before the Court on Defendants' Funds and Mittelbrun's Motion for Attorneys' Fees and Costs. Defendants request fees in the amount of $16,975.00 and costs in the amount of $546.09. Plaintiff failed to file a timely response. For the reasons stated below, the Court will GRANT an award of attorneys' fees to Defendants Funds and Mittelbrun without regard to Plaintiff's ability to pay (due to his failure to provide this information). The Court will DENY Defendants' request for costs.

II. BACKGROUND

Plaintiff filed his lawsuit against the International Brotherhood of Electrical Workers Local 58 ("Local 58"), Jeff Radjewski, Thomas Mittelbrun, and several fringe benefit funds ("the Funds").[1] The Funds and Mittelbrun filed a Motion for dismissal for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative Summary Judgment on October 29,

[1] According to Defendants, the proper legal names for the Funds are IBEW Local 58 Annuity Fund; Electrical Workers' Pension Trust Fund of Local Union # 58, I.B.E.W., Detroit, Michigan; Electrical Workers' Insurance Fund; Apprentice and Journeyman Training Trust of the Electrical Industry, Detroit, Michigan; Southeastern Michigan Electrical Industry Labor Management Cooperation Trust Fund; Supplemental Unemployment Benefit Plan of the Electrical Industry, Detroit, Michigan; Electrical Workers Joint Board of Trustees Vacation Fund.

Note, however, Defendants Jeff Radjewski and International Brotherhood of Electrical Workers Local 58 have not joined in this Motion or otherwise submitted a request for fees and costs. Therefore, the Court's reference to the Defendants collectively, for purposes of this Order, excludes Defendants Jeff Radjewski and International Brotherhood of Electrical Workers Local 58.

2001, and the Local 58 and Radjewski filed a Motion for Dismissal for Failure to Stat a Claim on Which Relief Can Be Granted, or in the Alternative Summary Judgment as to Counts I-V of Plaintiff's Complaint on November 19, 2001. In an Opinion and Order dated March 18, 2002 the Court granted Defendants' Motions. The Court also entered a judgment for Defendants against Plaintiff. Defendants now seek fees and costs pursuant to Employee Retirement Income Security Act, ("ERISA") Section 502(g)(1), 29 USC § 1132(g)(1).

III. ANALYSIS-WHETHER TO AWARD FEES AND COSTS

A. APPLICABLE LAW AND ARGUMENT

29 USC § 1132(g)(1) states in relevant part:

> In any action under this subchapter ... by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

"There is no presumption that attorneys' fees will be awarded." *Maurer v Joy Technologies, Inc.*, 212 F3d 907, 919 (6th Cir 2000). The trial court has broad discretion regarding whether or not to award attorneys' fees and costs. *Folstice v Guardsman Products, Inc*, 98 F.3d 933, 936 (6th Cir 1996), *cert den*, 520 US 1143 (1997); *Secretary of Department of Labor v King*, 775 F2d 666, 669 (6th Cir 1985); *Firestone Tire & Rubber Company v Neusser*, 810 F2d 550, 557 (6th Cir 1987).

In deciding whether to award fees in an ERISA action, the trial court must consider five (5) factors:

> (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances;(4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries *937 of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

King, 775 F2d at 669; *Firestone*, 810 F2d at 556; *Folstice*, 98 F3d at 936-937. The Sixth Circuit has repeatedly advised that these factors are to be utilized only as guidelines for the court's exercise of discretion. "Not all of the factors will be relevant in a given case, and no single factor is necessarily dispositive." *Firestone*, 810 F2d at 558; See also *Folstice*, 98 F3d at 937. Because no single factor is necessarily dispositive, however, the trial court must consider each factor before exercising its discretion. *Schwartz v. Gregori*, 160 F3d 1116, 1119 (6th Cir 1998), *cert den*, 526 US 1112 (1999); *Wells v United States Steel*, 76 F3d 731, 736 (6th Cir 1996)(aft rem). Defendants argue that each factor favors an award of fees and costs.

1. Bad faith

Defendants assert that Plaintiff's bad faith is evidenced by the fact that his claims had no basis in fact or law. Rather, per Defendants, Plaintiff's motive in filing this lawsuit seems to have been for the purposes of furthering his personal political agenda with unions generally and Local 58 specifically. Defendants' argue that plaintiff's pleadings reveal a personal belief that unions should not be able to negotiate and enforce contracts that provide for fringe benefits for those working under the contracts. Per Defendants, at great expense to Defendants, Plaintiff simply used this Court as a forum to air his political position.

Lastly, Defendants assert that Plaintiff's bad faith is evidenced by his litigious behavior. Per Defendants, Plaintiff was adjudicated a "vexatious litigator" in the Superior Court of California for San Diego County, California, Case No. 709757. He has also initiated litigation in the Eastern District of Michigan, the Northern District of Ohio (Case No. 3:01-7556) and the Northern District of California (Case No. 3:01-3733).[2]

[2] The Court could not find the district court cases to which Defendants refer. However, a Westlaw search using the name Lawrence Moore resulted in a list of numerous cases involving similar lawsuits against union locals in California by an electrician of the same name. The Court is not certain whether one or more of these cases involve the same Lawrence Moore who is a party to this case. However, given the similar nature of the cases, it seems very likely. In one case, ERISA

Defendants assert that Plaintiff is unlikely to be deterred from continuing this litigious pattern unless he is made to pay the costs of bringing unfounded claims against ERISA funds.

Defendants cite several cases in which courts have found bad faith or culpability on similar facts: *Griffeth v Sheet Metal Workers' Local Unions and Councils Pension Plan*, 34 F Supp 2d 1170, 1172-1173 (D AZ 1998)(bringing a frivolous claim constitutes "bad faith" or "culpability"); *Devine v American Benefit Corporation*, 27 F Supp 2d 669, 678 (SD W.VA 1998) (bad faith found where court found plaintiff's claims to be without support and unjustified); *Vintilla v United States Steel Corporation Plan for Employee Pension Benefits*, 642 F Supp 295, 297 (WD PA 1986), *aff'd*, 815 F2d 697 (3rd Cir 1987), *cert den*, 484 US 847 (1987)(plaintiffs found to be culpable where lawsuit filed despite strong adverse precedent, filing in improper venue, improperly naming one Defendant as a party and attempting "by extraordinary appellate procedures" to thwart removal to the proper venue).

2. *Ability to Pay*

This factor alone is not dispositive when an examination of all of the other factors favors an award or denial of fees. *Folstice*, 98 F3d at 937; *Firestone*, 810 F2d at 557-558. The Sixth Circuit has not set forth a clear rule regarding how an award is to be handled when the facts favor an award but the Plaintiff does not have the ability to pay. The court's ruling in *Cowden v Montgomery County Society for Cancer Control*, 653 F Supp 1072 (SDOH 1986), however, is instructive.

In *Cowden*, the court found that the plaintiff's ERISA claim was completely devoid of merit. 653 F Supp at 1073. The court stated that plaintiff and his attorney were put on notice at many intervals that plaintiff's claims were frivolous. Id at 1074-1077.

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sanctions were awarded for the reason that Moore's complaints against the Trust Funds included "vague and conclusory allegations lacking adequate foundations in either fact or law." *Moore v. Local Union 569*, 28 F3d 107, *2 (9th Cir 1994)(unpublished opinion). The Court further found that Moore had "unreasonably and vexatiously multiplied the proceedings ...." Id.

Yet, plaintiff continued to pursue the claims until mid-way through trial. Id at 1078. For these reasons, the court found that all of the relevant factors strongly favored an award of fees, except that plaintiff had not provided the court with sufficient information regarding his ability to satisfy an award of fees. The court rejected the defendant's suggestion that plaintiff's pleadings and conduct indicated his ability to pay. Id at 1077. Instead, the court determined that, in order to properly exercise its discretion, it would be necessary for the court to hold a hearing to assess plaintiff's ability to pay. Id. The court indicated that it would then award fees "in an amount commensurate with [plaintiff's] ability to pay." Id at 1079.

Defendant suggests that this Court follow *Evans v Blue Cross and Blue Shield of South Carolina*, 834 F Supp 887, 895 (D SC 1993) where the court awarded fees against the plaintiff, because four of the five factors favored an award against plaintiff. The court stated it did not weigh the second factor in its analysis, because neither party submitted any evidence regarding plaintiff's financial position. Id.

The court in *Devine, supra*, likewise treated this factor as neutral where the Plaintiff claimed to have no ability to award fees. 27 F Supp 2d at 678. The court did so, however, with apparent reluctance, because of the "significant and needless expense" imposed upon the defendants and its finding that there was an apparent lack of merit in bringing the suit at all. Id.

In this case, Plaintiff did not respond and Defendants do not offer any evidence regarding Plaintiff's finances. Defendants simply assert that Plaintiff is a highly skilled tradesman in a field with high demand and, therefore, is well situated to pay the requested fees and costs.

3. Deterrent effect

This factor is generally only considered relevant when deciding whether to award fees to a prevailing ERISA plaintiff. *Folstice*, 98 F3d at 937; *Firestone*, 810 F2d at 557; *Cowden*, 653 F Supp at 1078. Defendants assert, nevertheless, that other courts have found this factor to weigh in favor of a prevailing defendant where the plaintiff's claim was frivolous. *Cowden*, 653 F Supp at 1078 (award of fees should deter ERISA plaintiffs

from delaying the dismissal of frivolous and unfounded lawsuits); *Griffeth*, 34 F Supp 2d at 1173 (award of fees would deter other plan participants from bringing similarly frivolous claims); *Devine*, 27 F Supp 2d at 678 (award of fees will have a significant deterrent effect on those acting under similar circumstances).

4. Common benefit

There is no apparent common consensus among the courts regarding this factor. Defendants assert that their attempt to recoup attorney fees in this matter will confer a common benefit on all participants and beneficiaries. Per Defendants, if a fee award is denied, the participants and beneficiaries will ultimately bear the burden of the cost of this litigation through increased administrative fees and the fact that there will be proportionately less money available for benefits.

5. Relative Merits

Where the claim is found to be frivolous, the merits necessarily weigh in favor of the prevailing defendant. See *Devine*, 27 F.Supp at 678; *Griffeth*, 34 F Supp 2d at 1173; *Vintilla*, 642 F Supp at 297. The *Cowden* court, which found plaintiff's claim to be frivolous, considered this factor in tandem with the first factor (bad faith). 653 F Supp at 1074.

In the instant case, Defendants assert that a cursory review of the ERISA statute should have put Plaintiff on notice that he could not sustain his claims. Further, although Plaintiff is acting *in pro per*, Defendants assert that he has over 15 years of labor and ERISA litigation experience at the state and federal district and appellate court levels. Defendants do not provide any documentation to support this assertion.

B. ANALYSIS

Balancing the above five factors favors an award of fees to Defendants. Bad faith and ability to pay, the first and fifth factors, weigh if favor of Defendants for the reason that Plaintiff's claims were based on assertions of fact that were not supported by the record. It appears that Plaintiff acted without regard for the merits of his claim. See *Griffeth v Sheet Metal*

Workers' Local Unions and Councils Pension Plan, 34 F Supp 2d 1170, 1172-1173 (D AZ 1998)(bringing a frivolous claim constitutes "bad faith" or "culpability"); *Devine v American Benefit Corporation*, 27 F Supp 2d 669, 678 (SD W.VA 1998)(bad faith found where court found plaintiff's claims to be without support and unjustified); *Vintilla v. United States Steel Corporation Plan for Employee Pension Benefits*, 642 F Supp 295, 297 (WD PA 1986)(plaintiffs found to be culpable where lawsuit filed despite strong adverse precedent, filing in improper venue, improperly naming one Defendant as a party and attempting "by extraordinary appellate procedures" to thwart removal to the proper venue).

The Court does not have sufficient information to decide the second factor--whether Plaintiff has the ability to pay an award of fees and costs. However, because this factor is not dispositive, and Plaintiff failed to respond, the Court can simply proceed with an award without considering the second factor, as did the courts in *Evans v Blue Cross and Blue Shield of South Carolina*, 834 F Supp 887, 895 (D SC 1993) and *Devine*, 27 F Supp at 678.

The third factor, deterrent effect, weighs in favor of Defendants. This factor is generally only considered when deciding whether to award fees to a prevailing ERISA plaintiff. *Folstice v. Guardsman Products, Inc*, 98 F3d 933, 937 (6th Cir 1996); *Firestone Tire & Rubber Company v Neusser*, 810 F2d 550, 557 (6th Cir 1987); *Cowden v Montgomery County Society for Cancer Control*, 653 F Supp 1072, 1078 (SD OH 1986). However, as Defendants assert, an award of fees against Plaintiff could deter other plan participants from filing frivolous claims.

The fourth factor, whether Defendants sought to confer a common benefit on all participants and beneficiaries of their ERISA plans or resolve significant legal questions regarding ERISA, favors Defendants as well. There were no significant legal questions at issue. However, Defendants will likely pass the costs of such litigations onto plan participants and beneficiaries either directly by increasing administrative costs or indirectly by redirecting funds otherwise available to participants and beneficiaries to cover the costs of litigation. Defendants' pursuit of fee awards against frivolous claimants may act as an

effective deterrent.

Based on the foregoing, the facts of this case support an award of attorney fees to Defendants.

IV. ANALYSIS-AMOUNT OF AWARD

A. FEES

1. Applicable Law

The Court must apply the "lodestar" approach to determine the amounts of reasonable attorneys' fees. *Building Service Local 47 Cleaning Contractors Pension Plan v Grandview Raceway*, 46 F3d 1392, 1401 (6th Cir 1995); *Trustees of Detroit Carpenters Fringe Benefit Funds*, __ F Supp 2d __, 1995 WL 871160 (ED MICH 1995)(mem). The lodestar is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. Id; *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)(Brennan, J., Marshall, J., Blackmun and J., Stevens, J., concurring in part and dissenting in part). This lodestar figure is strongly presumed to represent a reasonable fee. *Grandview Raceway*, 46 F3d at 1401 (citing *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 US 546, 565 (1985).

The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed." *Hensley*, 461 US at 433; *Grandview*, 46 F3d at 1402. Whereas a fee applicant is not required to submit extremely detailed records, the applicant should "identify the general subject matter" of the work performed. *Hensley*, 461 US at 437. A fee applicant is further expected to exercise "billing judgment" with respect to claimed hours worked:

> Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission .... Hours that are not properly billed to one's client also are not properly billed to one's *adversary* pursuant to statutory authority. (citations omitted)

Id at 434. Where the documentation of hours is inadequate or the court finds that the hours were not "reasonably expended," the district court may reduce the award accordingly. *Hensley*, 461 US at 433-434.

The court's inquiry does not end with its calculation of the lodestar. *Grandview Raceway*, 46 F3d at 1402. Other considerations, such as the "results obtained" by the prevailing party, may lead the district court to further adjust the fee upward or downward. Id (citing *Hensley*, 461 U.S. at 434).

The Sixth Circuit has advised district courts to state clearly the reasons for the ultimate fee award and the reasons for any adjustments:

> In order to facilitate appellate review of a fee award, a district court must "provide a concise but clear explanation of its reasons for the award. [The] district court should state with some particularity which of the claimed hours the court is rejecting, which it is accepting, and why." Failure to provide such an explanation requires us to remand the case for further consideration. (*citations omitted*)

US Structures, Inc v. JP Structures, Inc, 130 F3d 1185, 1193 (6th Cir 1997); *Northcross v Board of Education Memphis City Schools*, 611 F2d 624, 636 (6th Cir 1980), *cert den*, 447 US 911 (1980). See also *Hensley*, 461 US at 437.

A reasonable rate is the prevailing rate, in the relevant market, for "similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stevenson*, 465 US 886, 895 n.11 (1984); *Northcross*, 611 F2d at 638. "[T]he burden is on the fee applicant to produce satisfactory evidence-in addition to the attorney's own affidavits-that the requested rates are in line with those prevailing in the community for similar services ...." *Blum*, 465 US at 896 n.11. The Court in *Blum* acknowledged the difficulty in determining the prevailing market rate. Id. However, the Court suggested that the "rates charged in private representations may afford relevant competence." Id; *See In re Olsen*, 884 F2d 1415, 1423-1424

(DC Cir 1989)(applicant submitted affidavit of competent local counsel's fee schedule).[3] In *Grandview Raceway, supra*, the Sixth Circuit reviewed the District Court's decision regarding a fee application and noted with favor that the District Court "reviewed affidavits attesting to the prevailing market rates of compensation in the relevant legal market for similar work." 46 F3d at 1402.

2. Defendants' Request

In their brief, Defendants request a fee award totaling $16,114.00. In support, Defendants provide the affidavit of Attorney Patricia J. Fabrizio attesting to the accuracy of the attached billing statements for all attorneys billing time. (Def's br, Exh A). The affidavit further attests to additional time billed by several attorneys, including Ms. Fabrizio, in the preparation of this motion. Id. However, in their Affidavit Regarding Fees and Costs, the amount of time billed by individual attorneys actually totals $17,227.00, when the additional time billed for work on this motion and additional matters are added (¶¶ 3-5). Presumably, the latter figure is the correct amount of fees that Defendants seek.

To establish that the hourly rates charged by Defense counsel are reasonable, Defendants have submitted an economic survey published by the Michigan Bar Journal regarding average attorney hourly rates in the year 2000, the affidavit of two local employees benefits practitioners and a summary of the background and experience of each billing attorney.

3. Analysis

Defendants' billing statement clearly lists the date, hours expended and nature of work done. Defendants clearly identified all attorneys billing time. Defendants do not request fees for work done by paralegals or clerks. It appears that the hours were reasonably expended in furtherance of the within litigation.

The billing rate of Defendants' counsel ranged from $100-180

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[3] The court in *Olson* declined to only rely upon the affidavits of attorneys retained in the case, stating the fee applicant was obligated to establish the reasonable rate through "independent evidence." *In re Olson*, 884 F2d at 1424 n.14.

per hour.[4] Based upon Defendants' submissions, the Court is satisfied that Defendants have provided sufficient evidence that the hourly rates charged by the billing attorneys in this case are in accord with the rate charged in the relevant market for "'similar services by lawyers of reasonably comparable skill, experience and reputation.'" *Blum v Stevenson*, 465 US 886, 895 n. 11 (1984); *Northcross*, 611 F2d at 638.

Based upon the foregoing, the Court finds that the appropriate lodestar figure is accurately set forth in Defendants' fee submission, without the need for further reduction. Therefore, the Court will grant Defendants' request for attorneys' fees in the amount of $17,227.00.

B. COSTS

1. Applicable Law

Costs in the instant case may be awarded per Federal Rule of Civil Procedure ("FRCP") 54 (d)(1)[5] and 28 USC § 1920. Section 1920 permits taxation of the following costs:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

"In seeking costs under Rule 54(d), the prevailing party has the burden of establishing that the expenses it seeks to have taxed as

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[4] Rolland R. O'Hare-$180/hr; Ann E.Neydon-$155-165/hr; Patricia J. Fabrizio-$155-165/hr; Hope L. Calati-$120/hr, and Frances Yturri-$100/hr.

[5] FRCP 54(d)(1) states, in relevant part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs...."

costs are authorized by applicable federal law, including proof of necessity and reasonableness under 28 U.S.C. § 1920." *Hall v. Ohio Education Association*, 984 F Supp 1144, 1146 (SD OH 1997). When seeking costs under Rule 54(d)(1), the "'prevailing party is prima facie entitled to costs and it is incumbent upon the unsuccessful party to show circumstances sufficient to overcome the presumption.'" Id (citing *Lichter Found, Inc v Welch*, 269 F2d 142, 146 (6th Cir 1959)). The presumption can be overcome if the court finds that the requested costs were unnecessary or unreasonably large. Id (citing *Lewis v. Pennington*, 400 F2d 806, 819 (6th cir 1968), *appeal aft rem*, 421 F2d 1380 (6th Cir 1970), *cert den*, 398 US 960 (1970)). "Therefore, if Defendants establish that the expenses are both necessary and reasonable, the Court will presume that Defendants should be awarded those costs." Id.

2. Defendants' Request

Defendants request a total of $546.09 for the following costs: facsimile expense ($3.45); courier ($30.00); photocopies ($42.00); computer-assisted research (Lexis-Nexis)(401.51), and Airborne Express ($68.73). Defendants assert that these costs were necessarily incurred in this litigation.

3. Analysis

The cost of "exemplification and copies of papers" are recoverable if the moving party provides evidence that the copies were "necessarily obtained for use in the case." 29 USC § 1920 (4); See *Hall*, 984 F Supp at 1146 (duplication expenses not allowed where defendants did not provide information regarding what was copied, how the copies were used or the necessity of the copies). Defendants claim $42.00 in photocopying expenses. however, as in *Hall*, Defendants have not provided any information regarding what was copied or the purpose of said copies. Therefore, the Court is unable to determine whether the copies were "necessarily obtained for use in this case."

Defendant requests a total of $102.18 for facsimile, courier and Airborne Express costs. These costs are not expressly allowed under § 1920 and have typically been disallowed by the courts. See *Hall*, 984 F Supp at 1146 ("the overwhelming weight of authority have declined to award costs for courier services, postage, telephone or fax charges"); *In re Penn Central*

Transportation Co., 630 F2d 183, 191-192 (3rd Cir 1980) (postage and courier fees disallowed); *Wahl v Carrier Mfg*, 511 F2d 209, 217 (7th Cir 1975)(charges for postage not ordinarily allowed); *Nugget Distributors Cooperative of America, Inc. v Mr. Nugget, Inc*, 145 FRD 54, 58 (ED PA 1992)("Nothing in § 1920 even remotely authorizes plaintiff's claims for ... fax, telex, postage [and] delivery service ... expenses.").

With regard to computer assisted research, § 1920 does not provide for reimbursement of this expense and there is a split of authority among the circuits regarding whether such a cost should be reimbursed. The sixth circuit has not yet weighed in on the debate but the split leans heavily against awarding this cost. The general consensus of the courts which have disallowed reimbursement is that such expenditures are more properly considered firm overhead and are not a separately taxable cost:

> The Court assumes that the actual time of a lawyer utilizing the research computer facility is, in fact, booked at his normal hourly rate. The Court thinks it inappropriate and unreasonable to permit an overhead item of this type to be recovered in addition to recovery for the time of the lawyer who used the research facility.

Weinberger v Great Northern Nekoosa Corp, 801 F Supp 804, 827 (D. Me 1992), *aff'd*, 47 F3d 463 (1st Cir 1995); *Yankee Candle v Bridgewater Candle Co*, 140 F Supp 2d 111, 126 (D Mass 2001), *aff'd*, 259 F3d 25 (1st Cir 2001); *Tri-Star Pictures, Inc v. Unger*, 42 F Supp 2d 296, 306 (SD NY 1990; *United States v Merrit Meridian Constr Corp*, 95 F3d 153, 173 (2d Cir 1996).

Conversely, several circuits view computer research fees as attorney fees because the attorney's research time is greatly reduced by the use of computer research:

> The added cost of computerized research is normally matched with a corresponding reduction in the amount of time an attorney must spend researching. Therefore, we see no difference

> between a situation where an attorney researches manually and bills only for the time spent and a situation where the attorney does the research on a computer and bills for both the time and the computer fee.

Cairns v. Franklin Mint Co, 115 F Supp 2d 1185, 1189 (CD Cal 2000), *aff'd*, 292 3d 1139 (9th Cir 2002)(citing *Haroco, Inc v American Nat'l Bank and Trust Co of Chicago*, 38 F3d 1429, 1440-1441 (7th Cir 1994); *Cleveland Area Board of Realtors v City of Euclid*, 965 F Supp 1017, 1023 (ND Ohio 1997); *Aloha Tower Associates Piers 7, 8 and 9 Ltd Partnership v Millenium Aloha, Inc*, 938 F Supp 646, 549 (D. Hawaii 1996).[6]

The court will disallow all of Defendants' requested costs. For the requested copying expenses, Defendants failed to provide sufficient evidence regarding what was copied, how they were used or the necessity for the same. *Hall, 984 F Supp at 1146.* For the balance of requested costs for fax, Airborne Express, courier fees and computer research, the court adopts the reasoning of other courts that have refused to allow such expenses that are not expressly allowed under § 1920.

V. CONCLUSION

For the foregoing reasons, THE COURT GRANTS IN PART AND DENIES IN PART Defendants' Funds and Mittelbrun's Motion for Attorneys' Fees and Costs. Specifically, the Court GRANTS Defendants' request for attorney's fees in the amount of $17,227.00 but DENIES Defendants' request for costs.
IT IS SO ORDERED.

Dated: AUG 13, 2002

Victoria A. Roberts
U.S. District Judge

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[6] Note, however, in Cairns, the court went on to reduce the requested computer research fees by twenty-five percent to reflect the fact that "Westlaw charges are not an exact substitute for an attorney's hourly rate.... [and] some part of Westlaw's charges must be considered overhead, if for no other reason than the fact that law firms do not charge clients for law books." *Cairns*, 115 F Supp at 1185.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Lawrence Moore	)	Case No. 01-72222
	)	
Plaintiff,	)	JUDGMENT IN FAVOR OF
v.	)	DEFENDANTS FUNDS AND
Int. B'hood of Elect.	)	TO DEFENDANTS FUNDS
Wkrs. Local 58, et al,	)	AND MITTLEBRUN
	)	
Defendants.	)	

This matter came before the Court on Defendants' Funds and Mittelbrun's Motion for Attorneys' Fees and costs, which was granted in an Order Granting in Part and Denying in Part Defendants' Funds and Mittelbrun's motion for Attorneys' Fees and costs entered on AUG 13, 2002. Therefore,

IT IS ORDERED AND ADJUDGED that the Court hereby Grants Defendants' Funds and Mittelbrun a Judgment in their favor and against Plaintiff, in the amount of $17,227.00.

IT IS SO ORDERED.

Dated: AUG 13, 2002

Victoria A. Roberts
U.S. District Judge

APPEAL NO. 02-1503
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Lawrence Moore	)	
	)	U.S.D.C. No. 01-72222
Plaintiff/Appellant,	)	
v.	)	
Int. B'hood of Elect.	)	ORDER
Wkrs. Local 58, et al,	)	
	)	
Defendants/Appellees	)	

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on the other parties and the Court.
This notice is to be prominently displayed in this decision if reproduced.

Before SILER, DAUGHTREY, and GILMAN, Circuit Judges.

Lawrence Moore, proceeding pro se, appeals a district court order dismissing his labor action filed pursuant to the Labor Management Relations Act, 29 U.S.C. § 185; the National Labor Relations Act, 29 U.S.C. § 158; the Employees Retirement Income Security Act, 29 U.S.C. § 1001 et seq.; and 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed.R.App.P. 34(a).

On June 13, 2001 Moore filed suit against the International Brotherhood of Electrical Workers Local 58 ("Local 58"), Jeff Radjewski, Thomas Mittelbrun, and several fringe benefit funds for monetary and equitable relief. Moore asserted in his complaint that: 1) the defendants violated his rights under the Free Speech Clause and the Takings Clause; 2) the defendants committed fraud and deceit; 3) the defendants breached the Collective Bargaining Agreement ("CBA"); 4) Local 58 and Radjewski breached their duty of fair representation; and 5) the

defendants intentionally inflicted emotional distress. Upon consideration of the pleadings the district court granted the defendants' motions to dismiss, or, in the alternative, for summary judgment.

In his timely appeal Moore essentially reasserts his claims and argues that the district judge should have recused herself.

Upon de novo review we conclude that the district court's judgment must be affirmed. *See* Fed.R.Civ.P. 12(b)(6) and 56(c); *Harrow Prods., Inc. v. Liberty Mut. Ins. Co.*, 64 F.3d 1015, 1019 (6th Cir. 1995); *Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1138 (6th Cir. 1995).

Moore's five claims substantially overlap and are based on virtually identical allegations. Moore, who was not a member of Local 58 but was a member of an affiliated union, received job referrals through Local 58's hiring hall to perform electrical work in July, 1998 and from the week ending September 16, 2000, through the week ending November 4, 2000. Moore's main complaint is that Local 58 supposedly tricked him into signing the union dues deduction form and would not refund the money or stop the withdrawals after he rescinded his authorization in a letter dated September 15, 2000. His other primary allegations were that Local 58 deducted the money while denying him a voice as a non-member, that the CBA did not permit deductions from the wages of non-members for union dues, that the defendants reduced his overtime pay rate, and that the defendants used the money deducted to make political contributions.

Moore's complaint lacked merit. Moore's first claim, in which he asserts that the defendants violated his constitutional rights, is not actionable. Generally, "the conduct of private parties lies beyond the Constitution's scope ...." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

Moore's other federal claim, breach of a duty of fair representation, is time-barred by the six-months statute of limitations for unfair representation claims. *Adkins v. Int'l Union of Elec., Radio & Mach. Workers*, 769 F.2d 330, 335 (6th Cir. 1985) (citations omitted). "[T]he statute of limitations begins to run when the claimant knows or should have known of the union's alleged breach of its duty of fair representation."

Schoonover v. Consol. Freightways Corp., 49 F.3d 219, 221 (6th Cir. 1995); *see also Adkins*, 769 F.2d at 335. Moore should have known of any alleged breach of the duty of fair representation well before he completed the second job during the week ending November 4, 2000. Moore, however, did not file his complaint within six months, but waited seven months, until June 13, 2001.

Moore's state law claims are based upon the same allegations as his federal claim of a breach of the duty of fair representation and thus are preempted by federal labor law and are also time-barred. "The duty of fair representation relates to an area of labor law which has been so fully occupied by Congress so as to foreclose state regulation." *Maynard v. Revere Copper Prods., Inc.* 773 F.2d 733, 735 (6th Cir. 1985); *see also In re Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, Local No. 173*, 983 F.2d 725, 728-29 (6th Cir. 1993). Moreover, when a federal claim of a breach of the duty of fair representation is barred by the six-month statute of limitations, "it would be anomalous to hold that the same claim survived the defense of limitations because it was stated in terms of state law." *Maynard*, 773 F.2d at 735.

Finally, the district judge did not abuse her discretion by failing to recuse herself. Moore was not entitled to recusal under 28 U.S.C. § 144 because he did not file an affidavit alleging judicial bias in the district court. *See United States v. Sammons*, 918 F.2d 592, 598-99 (6th Cir. 1990). Furthermore, the judge was not obligated to recuse herself pursuant to 28 U.S.C. § 455(a). A judge must only recuse herself where a reasonable person would be convinced that personal or extrajudicial bias exists. *Id.* at 599. No reasonable person would be convinced that the judge was biased against Moore. All of Moore's allegations referred to the judge's participation in the proceedings and do not support recusal. *See Id.*

Accordingly, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT.

Filed: SEP 13, 2002

Leonard Green
Clerk

APPEAL NO. 02-2073
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Lawrence Moore	)	
	)	U.S.D.C. No. 01-72222
Plaintiff/Appellant,	)	
v.	)	
Int. B'hood of Elect. Wkrs. Local 58, et al,	)	ORDER
	)	
Defendants/Appellees	)	

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Before: DAUGHTREY and GIBBONS, Circuit Judges; MILLS, District Judge.*

Lawrence Moore, proceeding pro se, appeals a district court order awarding attorneys' fees to the defendants pursuant to 29 U.S.C. § 1132(g)(1) of the Employees Retirement Income Security Act ("ERISA").

Moore filed suit against the International Brotherhood of Electrical Workers Local 58, Jeff Radjewski, Thomas Mittelbrun, and several fringe benefit funds ("Funds") pursuant to ERISA and other statutes. Upon consideration of the pleadings, the district court granted the defendants' motions to dismiss, or, in the alternative, for summary judgment, and this court affirmed the district court's judgment on September 13, 2002, in Case No. 02-1503.

After the district court issued its judgment, the Funds and Mittelbrun filed a motion for attorneys' fees and costs on April

* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

1, 2002, arguing in part that Moore was a vexatious litigant who had pursued frivolous labor claims for fifteen years in various jurisdictions. Because Moore did not file a response within 14 days as required by court rules, the district court ordered Moore's response to be stricken from the record. On August 13, 2002, the district court awarded attorneys' fees to the Funds and Mittelbrun in the amount of $17,227.00, but denied the request for costs. The district court reasoned that a fee award was merited because Moore had brought his claims in bad faith, an award would deter other plan participants from filing frivolous actions, and an award would confer a common benefit on plan participants and beneficiaries who would otherwise bear the cost of defending frivolous litigation.

In his appeal, Moore raises numerous challenges to the award.

Upon review, we conclude that the district court's judgment must be affirmed. Because Moore failed to timely respond to the defendants' motion for attorneys' fees in the district court, he has waived any objection he had to the defendants' application for and the district court's award of attorneys' fees. See Federal Deposit Ins. Corp. v. Binion, 953 F.2d 1013, 1018 (6th Cir. 1991).

Accordingly, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT.

Filed: MAR 28, 2003

Leonard Green
Clerk